

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 23, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MOHANAD ELSHIEKY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 2:20-CV-00064-SAB

**ORDER DENYING
DEFENDANT'S MOTION TO
DISMISS**

Before the Court is Defendant's Motion to Dismiss, ECF No. 4. A telephonic hearing on the motion was held on June 16, 2020. Defendant was represented by Assistant United States Attorneys John T. Drake and Derek T. Taylor. Plaintiff was represented by Benjamin J. Robbins, Matthew H. Adams, Jordan C. Harris, Lisa Nowlin, and Kenneth E. Payson.

Plaintiff Mohanad Elshieky is suing the United States Customs and Border Protection (CBP), alleging CBP agents approached him and detained him at the Spokane Intermodal Center without probable cause because of his North African appearance. He is bringing claims under the Federal Tort Claims Act (FTCA), 28 U.S.C § 1346(b)(1). The underlying basis for his FTCA claims are Washington state law claims of (1) False Arrest; (2) False Imprisonment; and (3) the Washington Law Against Discrimination (WLAD), Wash. Rev. Code 49.60 *et seq.*

1 The United States moves for the dismissal of the third claim, namely the
 2 claim under the WLAD for discrimination in the public accommodation context.¹
 3 First, it argues the WLAD claim must be dismissed because the United States has
 4 not waived its sovereign immunity for state civil rights claims in general.² It also
 5 argues the United States has not waived sovereign immunity for the specific
 6 WLAD claim at issue.

7 Second, the United States argues Plaintiff has failed to state a claim under
 8 the WLAD for two reasons: (1) Plaintiff has failed to show he was denied the “full
 9 enjoyment” of the place of public accommodation; and (2) the United States is not
 10 the proper defendant in this case because it does not have connection to the place
 11 of public accommodation.

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15 ¹ The FTCA explicitly waives sovereign immunity for any claim based on the “acts
 16 or omissions of investigative or law enforcement officers arising out of false
 17 imprisonment and false arrest.” 28 U.S.C. § 2680(h).

18 ² The United States again asks the Court to extend the reasoning of *Delta Sav.*
 19 *Bank v. United States*, 265 F.3d 1017 (9th Cir. 2001), to create a blanket rule that
 20 state civil rights claims are barred under the FTCA. The United States made this
 21 argument in a related case, *Segura v. United States*, 418 F.Supp.3d 605 (E.D.
 22 Wash. 2019). There, the Court declined to impose a blanket rule that the United
 23 States has not waived its sovereign immunity for state civil rights torts. *Id.* at 610.
 24 Instead, it concluded it was necessary to conduct the analogous private-party
 25 analysis. *Id.* The United States reasserts its blanket-rule argument to preserve it for
 26 appeal. The Court adopts the same reasoning as in *Segura* to conclude that courts
 27 are required to find analogous private-party conduct in assessing whether the
 28 FTCA waives the United States’ sovereign immunity.

Motion Standards

1. Fed. R. Civ. P. 12(b)(1): Lack of Subject Matter Jurisdiction

Pursuant to Fed. R. Civ. P. 12(b)(1), a district court must dismiss a Complaint if it does not have jurisdiction over it. In a “facial” jurisdictional challenge, the moving party is asserting that the allegations in the Complaint are insufficient on their face to invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). This type of jurisdictional challenge is limited to the allegations made in the Complaint. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). When evaluating a “facial” jurisdictional challenge, the Court accepts the allegations asserted in the Complaint as true and must draw all reasonable inferences in favor of the non-moving party. *Id.*

2. Fed. R. Civ. P. 12(b)(6): Failure to State a Claim

Pursuant to Fed. R. Civ. P. 12(b)(6), a district court must dismiss a Complaint if the plaintiff fails to state a claim upon which relief can be granted. While detailed factual allegations are not required, the Complaint must state “sufficient factual matter... to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When evaluating a 12(b)(6) motion, the Court must draw all reasonable inferences in favor of the non-moving party. *Wolfe*, 392 F.3d at 362. The allegations in the Complaint, which are accepted as true, must allow the Court to draw the reasonable inference that the defendant is liable for the alleged misconduct. *Bell Atl. Corp.*, 550 U.S. at 556.

To survive a 12(b)(6) motion, the allegations must allege “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Whether the Complaint states a claim for plausible relief is context specific and requires the Court to draw from its experience and common sense. *Id.* However, the Court is not required to accept as true any conclusory allegations, or any unreasonable inferences made in the Complaint. *In re Gilead*

1 *Scis. Sec. Litig.*, 536 F.3d 1049, 1054 (9th Cir. 2008).

2 **Background Facts**

3 The following facts are taken from the Complaint, ECF No. 1, and are
4 accepted as true:

5 On January 27, 2019, Plaintiff was traveling by Greyhound bus back to
6 Portland, Oregon from Pullman, Washington after performing a comedy show at
7 Washington State University. Shortly after Plaintiff boarded his transfer bus at the
8 Spokane Intermodal Center, two armed United States Customs and Border
9 Protection (CBP) agents boarded the bus. One of the CBP agents walked down the
10 bus and questioned three passengers of apparent Hispanic descent, two of whom
11 were asked to leave the bus.

12 The CBP agent then approached Plaintiff. The agent asked Plaintiff for
13 identification and Plaintiff provided his valid, unexpired Oregon driver's license.³
14 After examining the license, the CBP officer asked Plaintiff if he was a United
15 States Citizen. Plaintiff replied he was a Libyan citizen, and not a United States
16 citizen. The CBP agent then blocked Plaintiff's exit from the seat and requested
17 that Plaintiff produce a passport. Plaintiff replied that he did not have one with
18 him, and the CBP officers asked if Plaintiff had any other form of identification.
19 Plaintiff then provided his original employment authorization document (EAD),
20 which is issued by United States Customs and Immigration Services (USCIS). The
21 CBP agent then order Plaintiff off the bus.

22 Once outside, another CBP agent, along with the original CBP agent,
23 approached and started questioning Plaintiff. Plaintiff explained that he had been
24 granted asylum and was legally present in the United States. The CBP agents
25 asked if he had his asylum approval documents. Plaintiff responded that he did
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27 ³Oregon law requires proof of lawful presence in the United States to obtain a
28 driver's license. *See* Or. Rev. Stat. § 807.021(1).

1 not, but that he did have a valid EAD, issued by USCIS. After replying that,
2 “illegals fake these [documents] all the time,” one of the agents took Plaintiff’s
3 documents and made a phone call. Plaintiff heard the CBP agent read off his
4 information and the person on the other end verify that there was some record of
5 Plaintiff.

6 This agent then re-approached Plaintiff and stated that there was no record
7 of Plaintiff’s asylum grant, but there was a record of Plaintiff entering the United
8 States with a now-expired J-1 visa. Plaintiff responded that he was granted asylum
9 in October of 2018. The CBP officers insisted there was no record of Plaintiff’s
10 asylum case. Plaintiff then stated that he wished to speak to his lawyer and wanted
11 his paperwork back. The original CBP agent yelled at Plaintiff, and the two agents
12 conferred with one another. The agents then told Plaintiff that they would “let him
13 go this time.” After twenty minutes, Plaintiff was able to re-board the then late
14 bus, which left right away.

15 **1. Fed. R. Civ. P. 12(b)(1)**

16 The United States argues the Court does not have subject matter jurisdiction
17 over Plaintiff’s WLAD claim because it has not waived its sovereign immunity for
18 WLAD claims. It is true the United States cannot be sued unless Congress waives
19 its sovereign immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Jurisdiction
20 over any suit against the United States requires a clear statement from Congress
21 waiving its sovereign immunity. *United States v. White Mountain Apache Tribe*,
22 537 U.S. 465, 472 (2003) (quoting *United States v. Mitchell*, 445 U.S. 535, 538-39
23 (1980)). In passing the Federal Tort Claims Act (FTCA), Congress waived its
24 sovereign immunity “in the same manner and to the same extent as a private
25 individual under like circumstances.” 28 U.S.C. § 2674. This waiver is in
26 accordance with the law of the place where the act or omission occurred. 28 U.S.C.
27 § 1346(b). If the law of the state where the act or omission occurred would hold a
28 private party liable, the United States will be liable for the same. *Schwader v.*

1 *United States*, 974 F.2d 1118, 1122 (9th Cir. 1992).

2 In passing the FTCA, Congress did not create a new cause of action, but
 3 rather accepted liability under circumstances that would create private liability.
 4 *Feres v. United States*, 340 U.S. 135, 141 (1950). The United States waives its
 5 sovereign immunity where local law would make a “*private person* liable in
 6 torts.” *United States v. Olson*, 546 U.S. 43, 45 (2005) (emphasis in original).
 7 While the United States can never be exactly like a private actor, the Court must
 8 find the most reasonable analogy to the government’s actions to private liability.
 9 *Dugard v. United States*, 835 F.3d 915, 919 (9th Cir. 2016). In doing so, the
 10 words “like circumstances” within 28 U.S.C. § 2674 do not limit the Court to
 11 looking into the same circumstances, “but require it to look further afield,” *Olson*,
 12 546 U.S. at 44 (citing to *Indian Towing Co. v. United States*, 350 U.S. 61, 64
 13 (1955)). In *Indian Towing*, the U.S. Supreme Court held that the FTCA waived
 14 the United States sovereign immunity for a claim that alleged the U.S. Coast
 15 Guard negligently operated a lighthouse. 350 U.S. at 62. It found that these
 16 allegations were analogous to allegations of negligence by a private person “who
 17 undertakes to warn the public of danger and thereby induces reliance.” *Id.* at 64-
 18 65. Although the federal government “could never be exactly like a private actor,
 19 a court’s job in applying the standard is to find the most reasonable analogy.”
 20 *Dugard*, 835 F.3d at 919.

21 Thus, the first step in determining whether the WLAD imposes tort liability
 22 upon a private person for the wrongful conduct alleged in Plaintiff’s complaint is
 23 to identify a reasonable private party analogy to the CBP’s actions. *Id.*; *Segura v.*
 24 *United States*, 418 F.Supp.3d 605, 610 (E.D. Wash. 2019); *see supra* fn. 2. In
 25 *Segura*, the Court concluded the reasonable analogous private party conduct for
 26 the CBP officers in like circumstances was that of a private security officer, and
 27 because Washington courts would hold a security guard’s company liable for the
 28 discriminatory conduct of its security guards, the United States waived its

1 sovereign immunity with respect to the plaintiff's WLAD claim. *Id.* at 613.

2 The United States asks the Court to reconsider its reasoning and
3 conclusions, arguing that the proper analysis is a private citizen acting in a private
4 capacity, relying on the Second Circuit's decision in *Liranzo v. United States*, 690
5 F.3d 78, 82 (2nd Cir. 2012). The United States relies on *Liranzo* to argue that this
6 Court must analogize the CBP's conduct to a "person who, entirely is his or her
7 private capacity, places someone under arrest for an alleged violation of the law."
8 ECF No. 4. It asserts that using the private security guard analogy misses the mark
9 because it assumes a connection between the CBP agents and the Intermodal
10 Center, or stated another way, that there is an employment or agency relationship
11 between the CBP agents and the Intermodal Center.⁴

12 Here, the Court reaffirms that the private security guard is the proper
13 private party analogy for the CBP's conduct as alleged in Plaintiff's Complaint.
14 The Court notes that the facts as alleged do not support a finding that the CBP
15 agents' conduct is analogous to a person effectuating a citizen's arrest. Under
16 Washington law, a private citizen may detain a person for a misdemeanor if it (1)
17 constitutes a breach of peace and (2) is committed in the citizen's presence. *State*

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19 ⁴ The United States made this argument in *Segura* as well. In that case, the United
20 States asked the Court to dismiss the WLAD claim because the CBP agents who
21 engaged in the alleged discrimination were not employees or agents of the Spokane
22 Intermodal Center and the United States did not own, operate, or exercise control
23 over the Spokane Intermodal Center. *Segura*, 418 F. at 613. The Court declined to
24 read the WLAD so narrowly. *Id.* Given that the facts alleged suggested that the
25 CBP officer did not just happen to show up at the Spokane Intermodal Center, it
26 concluded the WLAD covered situations where federal officers enter places of
27 accommodation and wield their power over individuals at places of
28 accommodations. *Id.*

1 *v. Garcia*, 146 Wash. App. 821, 824 (2008). There is nothing in the facts alleged
 2 by Plaintiff suggesting he was breaching the peace to permit the CBP officers to
 3 conduct a citizen's arrest, nor did the CBP have sufficient suspicion or probable
 4 cause that Plaintiff was committing a misdemeanor. The private citizen's arrest is
 5 not the most reasonable private party analogy.

6 Moreover, just as the Court found in *Segura*, Washington law would hold a
 7 security guard company liable for the discriminatory conduct of its security guards
 8 and the United States, as employer of the CBP agents, would be liable to Plaintiff
 9 under the WLAD as if it were the security guard company. *Id.* at 613.

10 Consequently, because the WLAD imposes tort liability upon a private person for
 11 the wrongful conduct alleged in Plaintiff's Complaint, it follows that the FTCA
 12 waives the United States' sovereign immunity for Count 3 of the Complaint.

13 2. Fed. R. Civ. P. 12(b)(6) – Failure to State a Claim

14 Wash. Rev. Code 49.60.215 prohibits discrimination in the realm of public
 15 accommodations. The statute provides:

16 (1) It shall be an unfair practice for any person or the person's agent
 17 or employee to commit an act which directly or indirectly results in
 18 any distinction, restriction, or discrimination, or the requiring of any
 19 person to pay a larger sum than the uniform rates charged other
 20 persons, or the refusing or withholding from any person the
 21 admission, patronage, custom, presence, frequenting, dwelling,
 22 staying, or lodging in any place of public resort, accommodation,
 assemblage, or amusement, except for conditions and limitations
 established by law and applicable to all persons, regardless of race,
 creed, color, national origin

23 Wash. Rev. Code 49.60.215.⁵

24 Protected individuals are guaranteed "[t]he right to the full enjoyment of
 25 any of the accommodations, advantages, facilities, or privileges of any place of
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27 ⁵ Wash. Rev. Code 49.60.215 was amended on March 18, 2020, effective June 11,
 28 2020, to prohibit discrimination based on citizenship or immigration status.

public resort, accommodation, assemblage, or amusement.” Wash. Rev. Code 49.60.030(1)(b); *State v. Arlene’s Flowers, Inc.*, 193 Wash.2d 469, 501 (2019).

To state a claim for relief under the WLAD for discrimination in the public accommodation context, the plaintiff must show (1) the plaintiff is a member of a protected class, (2) the defendant is a place of public accommodation, (3) the defendant discriminated against the plaintiff, directly or indirectly, and (4) the discrimination occurred “because of” the plaintiff’s status, or in other words, the plaintiff’s protected status was a substantial factor causing the discrimination. *Arlene’s Flowers, Inc.*, 193 Wash. 2d at 501-02.

a. Denial of Full Enjoyment of Public Accommodation

The United States argues Plaintiff has failed to state a claim upon which relief can be granted because he was able to re-board the bus and therefore, he cannot show that he was denied access to the public accommodation and was not deprived of its full enjoyment.

The Court disagrees. The WLAD’s “full enjoyment” language extends “beyond the denial of services to include liability for mistreatment that makes a person feel ‘not welcome, accepted, desired or solicited.’” *Floeting v. Grp. Health Coop.*, 192 Wash. 2d 848, 855 (2019), quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 450 (1964) (“The ‘fundamental object’ of laws banning discrimination in public accommodation is ‘to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”). The statute’s primary purpose “is to the withholding or refusing of admission to places of public accommodation, and the use of their facilities on equal footing with all others.” *Fell v. Spokane Transit Auth.*, 128 Wash. 2d 618, 636 (1996).

Plaintiff has sufficiently alleged he was deprived the full enjoyment of a place of public accommodation.

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1 **b. Control of the Spokane Intermodal Center**

2 The United States also asserts that Plaintiff cannot establish the second
3 element of the public accommodation claim because the United States is not a
4 place of public accommodation. As it does not own, operate, or assert control over
5 the Intermodal Center, it cannot be sued for violations of the public
6 accommodation provision of the WLAD.

7 Once again, this Court declines to read the WLAD as narrowly as the
8 United States suggests. The CBP agents did not just happen to show up at the
9 Intermodal Center. In *Segura*, the Court found that the WLAD covered instances
10 where federal officials “wield their power over individuals at places of
11 accommodation” *Segura*, 418 F.Supp.3d at 613. As alleged in the Complaint, the
12 CBP agents entered the bus without a valid ticket, questioned passengers about
13 their legal status in the United States, removed persons from the bus, and delayed
14 the departure of the bus. It is reasonable to infer from these allegations that the
15 CBP agents asserted sufficient control over a place of public accommodation to
16 state a claim against the United States for violating the public accommodation
17 provision the WLAD.

18 At this stage of the proceedings, Plaintiff has stated a valid claim that can
19 proceed beyond the pleading stage and into discovery.

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Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant's Motion to Dismiss, ECF No. 4, is **DENIED.**

IT IS SO ORDERED. The Clerk of Court is directed to enter this Order and forward copies to counsel.

DATED this day of 23rd June 2020.



A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

Stanley A. Bastian
United States District Judge